THE MEANING OF "POLICE POWER"

BY CHARLES KELLOGG BURDICK

THE people of the United States at the close of the Revolution, though they felt keenly the dangers of disunion, were so afraid of a strong central Government, which they feared might draw to itself despotic power, that they nearly rejected our present Constitution. Several of the State conventions were with the greatest difficulty dissuaded from making their adoption conditional upon the incorporation of certain amendments, and this was accomplished only by the promise that the suggested amendments would be brought before Congress as soon as it convened. Of those which were proposed, ten were quickly adopted. These amendments are in the nature of a bill of rights, and constitute restrictions upon the Federal Government only. The Tenth Amendment declared, what was probably already implied, that the States retained all the powers not expressly denied to them or granted to the United States. The Fifth Amendment contained, among others, the provision that no person should be deprived of life, liberty or property without due process of law.

The body of the Constitution does not contain many restrictions upon the powers of the States, but there is one which is of great importance, namely, that no State shall impair the obligation of contracts.

Americans in the early days of the Republic were strong individualists, jealous of all governmental control, and particularly of control by a Government located at a distance, not subject to the dictates of the electorate of the State, and which was in their view almost a foreign Power. This attitude ripened into the doctrine of States' Rights, which finally disrupted the Union. At the close of the Civil War the Thirteenth, Fourteenth and Fifteenth Amendments were added to the Constitution. Their primary purpose was to guaranty to the colored race equal civil and political rights; but to accomplish this end,

certain restrictions were put upon the powers of the States. One of these restrictions was contained in a clause of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty or property without due process of law,—a provision, it will be noticed, identical with the restriction put upon the Federal Government by the Fifth Amendment.

The clause against the impairment of the obligation of contracts was early declared by Chief Justice Marshall in the famous Dartmouth College case to protect contracts made by a State as well as contracts made by individuals from subsequent impairment by the State, and it was also declared that the grant of a franchise by a State creates a contract between the State and the recipient of the privilege granted. Rather curiously, the "due process" clause of the Fifth Amendment received very little interpretation up to the time when a similar restriction upon the States was incorporated into the Fourteenth Amendment. Since that time, however, the Supreme Court of the United States has had to pass very frequently upon the meaning of due process as it affects Federal or State legislation and has held that the due process clauses were intended to constitute restrictions upon the legislatures as well as upon the other branches of the State and Federal Governments.

What then is due process, and how are we to tell whether its bounds have been overstepped by a legislative body? The Supreme Court has consistently refrained from attempting any real definition of due process, feeling it to be wiser to determine its boundaries gradually by the process of "inclusion and exclusion," as cases come before it. Perhaps the nearest that that tribunal has come to giving us a definition is in its declaration that legislation to constitute due process must conform to those principles of liberty and justice which lie at the base of our civil and political institutions. This, however, is intentionally vague, and gives nothing more than an indication of the general direction which legislation must take in order to be constitutional. It is necessary to study the great mass of decided cases to get a more definite understanding of what due process in legislation really is.

Clearly, taxation constitutes due process when it is for a public use. Property taken by eminent domain is also taken with

due process when taken for a public use, and when just compensation is made. Of course in both of these fields we are confronted with the necessity of determining what *is* a public use. Obviously when a tax is levied, or property is taken for the use of the State or of a municipality in its governmental capacity, as for a court house or a city hall or, in the case of a tax, for ordinary government expenses, it is taken for a public use. Quite as certainly, property is taken for a public use when it is taken by taxation or eminent domain for a purpose which will be directly useful to the members of the community as a whole, and a purpose which is not usually accomplished by ordinary private businesses, but can only be adequately accomplished by the aid of such powers of government. Examples of such purposes are the construction of railroads, water, gas and electric plants, and the establishment of cemeteries and parks, among many that might be named. But the Supreme Court has been very liberal in upholding the determination of the States as to what is included within the term public use. It has held, for example, that in a period of emergency a public fuel yard is a public use for which funds may be raised by taxation, and very recently it may be said to have laid itself open to the charge of being distinctly radical when it held that taxation by the State of North Dakota for the purpose of maintaining public grain elevators, of producing and selling agricultural implements, of helping farmers acquire their own farms, and of conducting a State bank, was constitutional, though here was a well-developed scheme of State socialism. Furthermore, it has upheld the exercise of the power of eminent domain where the direct benefit would be derived only by an individual, but where the circumstances were shown to be such that only by aiding individuals in this way could the natural resources of the State be adequately developed.

With regard to taxation and eminent domain, the Supreme Court has gone far, but the greatest development in the scope of due process has been in the field of the police power. While eminent domain is essentially a power to take property for the *use* of the public, and involves the necessity of paying for the property taken, the police power inheres in the State for the

protection of its citizens, and its exercise carries with it no duty of compensation. Goods may actually be taken from a person under the police power, where the protection of the public demands it, as where infected cattle are taken and killed, or infected clothing is required to be destroyed. Ordinarily, however, the public can be adequately protected by restricting the way in which property may be used, without actually taking a man's goods and chattels away from him. Still, any limitation upon the use which a man may make of his property is a taking of his property in the eye of the law, and must be shown to be within the limits of due process to be constitutional. How extensive, then, is this right of protecting its citizens, which is the very life of the police power of the States? It has been accepted as a matter of course that a State may interfere with proprietary rights for the protection of the safety, health, morals and public order of the community. Innumerable examples of such legislation will at once come to everyone's mind. But the Supreme Court has gone much further than this. It has annexed to the jurisdiction of the police power the vast field of "public welfare" —not merely physical and moral, but economic. This has been done against constant opposition, but the trend of decisions has nevertheless been steadily forward. It was first declared that rates to be charged by grain elevators could be regulated, because it was shown that the business involved a commodity of great importance to the public, and because in the States in question it was a business monopolistic in character, or at least in tendency. These features subjected the public to the possibility of oppression, and so were held to justify legislation for their protection. Soon the court took a step further, holding that the charges of grain elevators may be regulated in a State where no monopolistic tendency is shown, on the ground that because of their importance to the public they have taken on a sort of public character, and so may be regulated in the interest of public welfare. Here, indeed, we have a doctrine of very wide scope. Though the case was decided by a court divided five to four, it has since been approved and its doctrine applied in a decision supporting legislative regulation of the insurance business. The power to regulate rates has been frequently exercised without hesitation in cases

of all public utilities, such as railroads, telegraph and telephone lines, water, gas and electric lighting plants.

Public welfare as the basis of police power has won another notable victory in the field of labor legislation. Laws requiring sanitary conditions and safe appliances have been readily sustained, and legislation restricting the hours of labor, in particularly and obviously unhealthful employments, were upheld without great difficulty. In 1905 in the Lochner case a New York statute limiting work in bakeries to a ten-hour day was held unconstitutional by the Supreme Court, because it did not appear that work in bakeries was particularly unhealthful. Three years later, however, a statute creating a ten-hour working-day for women was upheld, on the ground that women as a class particularly need protection from the general evils of overwork for their own welfare and for the welfare of the race. Finally, in 1917, the Lochner case was in effect overruled, though not mentioned, when the Oregon ten-hour law was upheld on the ground that excessive work by any person, in any field, is injurious to the individual, and so when practiced by large numbers is contrary to the welfare of the community at large. In the same year the Supreme Court, though by a vote of four to four, upheld the Oregon minimum-wage law, on the ground that it is contrary to the interests of the community as a whole, as well as of those immediately effected, for large numbers of persons to receive less than a living wage. In considering labor legislation one should also not forget that workmen's compensation laws of quite various types have been uniformly held constitutional by the Supreme Court. Many other striking examples could be given of legislation affecting property which has been upheld as a proper exercise of the police power, because it was passed to safeguard the public welfare, but enough have been referred to to show the general trend of judicial opinion.

Theoretically, the United States has no general police power like that possessed by the States, except for the government of the District of Columbia and of the territories. Outside of those spheres of government it has only those powers which are expressly or by necessary implication given it by the Federal Constitution, and a general police power is not among them.

But, nevertheless, a very wide police power has in fact been developed by the National Government in connection with the express powers granted to it by the Constitution, for it has been held that those powers may be exercised for the same general purposes for which the police power may be called into play by the States. Thus, in controlling the mail service, the Federal Government takes occasion to protect the public against fraudulent and obscene literature sent through that channel, and we are all familiar with the interstate commerce act, with its provisions against unreasonable charges and discrimination, the anti-trust law, the pure food and drug act, the "white slave" act, and the many other laws passed under the authority of Congress to control interstate and foreign commerce.

Another important doctrine, which has not been nearly so much discussed as the doctrines connected with due process, which we have just been considering, has to do with the clause in the Constitution which declares that no State shall pass any law impairing the obligation of contracts. This doctrine is to the effect that every contract is made subject to the State's right to exercise its police power. It has been repeatedly applied to contracts made with the State, and to contracts which public utilities have made with their patrons. While it has not been so frequently applied to contracts between private individuals, the Supreme Court has many times declared that such contracts are made in subordination to the police power. This means that if the performance or enforcement of a contract is interfered with by legislation in the due enforcement of the police power, the obligation of the contract is not impaired in the sense in which the impairment of contracts is prohibited by the Constitution. Since the police power is interpreted just as liberally in this connection as it is in connection with the due process clauses of the Constitution to include the protection of the public welfare, as well as the public safety, health, morals and public order, the principle here involved gives to State legislatures wide discretion in the matter of legislation affecting contracts.

The American theory of constitutional government is that written constitutions are not framed merely as general statements of political principles, which it is believed should guide

future generations, but as binding limitations upon all branches of the Government, which are to be enforced by the courts as the supreme law of the land. Such limitations constitute guaranties on behalf of minorities against hasty and arbitrary action on the part of majorities, and it is the duty of our courts to see that these guaranties are not overstepped. Still, it is to be borne in mind that a public opinion which is persistently adhered to, and which ripens into a strong conviction on the part of a considerable majority of the community, is bound sooner or later to become law, if not in conformity with the Constitution, then as an amendment to that fundamental law. It does not follow that courts should give effect to legislation simply because it expresses the will of the majority, if it clearly falls within the inhibitions of the State or Federal Constitution. It is, however, both wise and reasonable that courts should indulge every legitimate presumption that the legislative branch of the Government has acted within its constitutional powers, and that they should hold that legislation should only be declared unconstitutional if there is no doubt of its conflict with constitutional provisions. The burden is always upon the one who attacks a statute to prove that it is unconstitutional.

We have seen how vastly the scope of the police power has grown in late years. This has been in response to a persistent public opinion, which itself reflects a wide swing of the pendulum from a predominantly individualistic philosophy to what may be called a philosophy of collectivism,—a philosophy which gives first place to the interest and development of the group, class, or community. Altered economic and social conditions have brought about this change of emphasis, and with this change has constantly developed an increasing demand for legislation to protect the interests of groups and classes and communities. The courts have generally found justification for such legislation, when not wholly arbitrary and despotic, in the police power, and so have brought it within the sanction of due process, and within a reasonable interpretation of the clause protecting contracts. Thus, by gradual development of the police power, the due process clauses and the contract clause of the Constitution have come to be so interpreted as not to thwart the will of the majority

when expressed in legislation whose avowed object is the protection of the interests of the public, and whose purposes cannot be said to be clearly unreasonable or oppressive. As to whether legislation meets this very liberal test, the Supreme Court of the United States is the final judge. In reaching its conclusion, however, it will take into account all relevant circumstances, both social and economic, as is shown particularly by the opinions of the Court in its more recent decisions, and it will give great weight to the judgment of the legislature, especially if it is shown that that body acted after a careful investigation of the situation to be remedied. An excellent example of the modern attitude of the courts is to be found in the recent decision of the New York Court of Appeals and of the Supreme Court of the United States, upholding certain provisions of the New York rent laws. Those provisions restrict the landlord in New York City to the receipt of a reasonable rent, irrespective of what rent has been contracted for, and deprive him of the right to oust a hold-over tenant, even though the tenant has expressly contracted to surrender the property at the end of his term. Clearly, the landlord's proprietary rights are interfered with, and his right to enforce his contract is temporarily suspended. It appeared to the court, however, that the legislature had made a careful investigation of the situation in New York City, that the legislature had been convinced that the tenant class in that city needed special protection during the present housing crisis, and that the legislation in question had been passed to meet this situation. The courts held that there was evidence to support the legislature's findings, and that the measures adopted to meet the situation were reasonable. The court, therefore, declared that the legislation in question was a valid exercise of the police power. These decisions are strikingly illustrative of the modern doctrine of the police power. Though the guaranties of personal liberty have been substantially restricted, this is the necessary price which has had to be paid to meet the changing and more complicated conditions of modern society.

CHARLES KELLOGG BURDICK.